Refer to: Physicians unions—Guilds (Report to the Council of the California Medical Association). Calif Med. 117:92-95, Sep 1972

Physician Unions—Guilds

LAST NOVEMBER, A LETTER TO THE *American Medical News* from a San Francisco physician concluded with the statement: "I, for one, will continue to treat without charge my share of those who need my services and cannot pay, to teach without compensation the next generation of my fellow doctors, and to be the most conscientious doctor that circumstances will allow. But I'm for trading my badge of virtue for a union dues book."

In the months following this letter, the topic of unions for physicians has been a recurring theme in the press. An article in *Medical World News* offers one explanation of why some physicians are now interested in unionization. "In the seven years since the AMA lost its fight against Medicare, doctors who felt convinced that economic and political pressures on private practice would sooner or later become unbearable have groped for ways to organize and confront third parties with collective strength."

There is no doubt that physicians in various parts of the country are seeking ways and means to bolster their ability to resist unwanted government encroachments. There is also no doubt that the success of trade union members in improving their working conditions and wages through collective bargaining poses an attractive thought to physicians seeking an "escape" from political domination. A sampling of the articles in the press on this subject reveals a growing list of organizations entering this field. The April 3 issue of *American Medical News* reports that 30 Las Vegas physicians have formed the nation's first labor-affiliated union of physicians in private practice: the Nevada Physicians Union Local 676 of the Service Employees International Union, AFL-CIO. A recent edition of the *San Francisco Chronicle* notes that some 200 Bay Area physicians attended the first meeting of the Union of American Physicians in San Francisco.

The Wall Street Journal of March 6 discusses efforts by interns and residents in California and Chicago to form unions, noting that the Chicago group is considering affiliation with the AFL-CIO's Amalgamated Meat Cutters and Butcher Workmen of North America. A nationally chartered organization called the American Physician's Guild, with headquarters in Florida and branches in five states, the *American Medical News* reports, is urging a nationwide campaign to have physicians form "union-type" associations. The April 14 issue of *Medical World News* features an article titled "Doctors' New Bag Out West Is Unionism" and adds two additional organizations to those mentioned above, the San Antonio-based American Physicians Union and the Massachusetts Federation of Physicians.

Taken together, these and similar articles raise fundamental questions for the medical profession. They also present the reader with a veritable jungle of conflicting information and opinions. As a result, CMA feels that a thorough and factual examination of the physicians' union concept is called for.

What Exactly Is a "Union"?

With all the recent discussion of unions and "union-type" organizations for physicians, some particularly basic questions often have been overlooked: Exactly what constitutes a union? Who may form a union? What are a union's powers—both in regard to its members and in negotiating? In the United States, the answers to these questions have been spelled out in legislation and legal decisions over the years.

This report was adopted by the Council of the California Medical Association at its 585th Meeting, July 28, 1972, San Francisco.

Reprint requests to: Mr. Milton Krueger, Division of Professional and Public Relations, California Medical Association, 693 Sutter Street, San Francisco, Ca. 94102.

In law, a "union" or "trade union" is an association of (1) employees having a common employer; or (2) employees whose employers are engaged in a common industry; or (3) employees whose employers hire people in a specific trade or occupation. In each instance, the relationship of employer-employee must be involved. These organizations of employees have been given legal recognition to permit collective bargaining for the purpose of improving such terms and conditions of employment as wages, working environment and fringe benefits.

The weapons that unions have to enforce their bargaining demands are those of strike, threat of strike, or boycott. In connection with collective bargaining for improved terms of employment, the law sanctions strikes and, under some circumstances, boycott. Certain types of boycotts, such as secondary boycotts, are illegal.

What are a union's powers in regard to its members? In its 1959 decision in the case of *Chavez vs. Sargent,* the California Supreme Court quoted the following statement of the relationship between a union and its members:

"First, a union in collective bargaining acts as the representative of every worker within the bargaining unit. It speaks for him, makes choices of policies which vitally affect him, and negotiates a contract which binds him. His wages, his seniority, his holidays, and even his retirement are all governed by this contract which becomes the basic law of his working life. The union in bargaining helps make laws; in processing grievances acts to enforce those laws; and in settling grievances helps interpret and apply those laws. It is the worker's economic legislature, policeman, and judge. The union, in short, is the worker's industrial government. The union's power is the power to govern the working lives of those for whom it bargains, and like all governing power should be exercised democratically."

As this decision clearly states, a union exercises considerable power over the lives of its members. Furthermore, the courts have made it quite clear that members are committed to abide by union policies, whether they agree or not. A good illustration of this is the case of Cecil B. de Mille, who was ousted from a union for refusing to pay a $1 levy for political activities. As a matter of principle, de Mille fought the case all the way to the Supreme Court and lost.

Within the narrow framework allowed unions, these organizations of employees have been granted certain exemptions from the anti-trust laws.

What Do These Legal Points Mean for Physicians' Unions?

A recent letter to physicians calling upon them to form a "union" states: "It has been argued that by descending into the arena of collective bargaining we, as doctors of medicine, will lose our mantle of professionalism. We have only to look to our younger colleagues who, in spite of their as-yet untarnished idealism, have organized and won a decent wage for interns and house officers."

Elsewhere, the same letter states: "Without delving too deeply into the laws of economics it is easy to see that the physician has long ceased to be an independent entrepreneur and has in fact become an employee, either of insurance companies or of the government."

These statements raise a significant legal point and one basic to any discussion of physicians' unions. That is, a clear distinction exists—as far as labor law is concerned—between physicians who are employees and private-practice physicians who are self-employed.

For the purposes of clarification, "employer" might be defined generally as one who engages the services of another person or persons for wages or salary, "employee" as one who works for wages or salary in the service of an employer and "employer-employee relationship" as the basis under which the employer compensates the employee for his work. Physicians who are truly employees usually work for wages or salaries. Their time is not their own. By the terms of their employment, they are required to perform the employer's work during specified hours. While so engaged, these physicians are furthering the business of their employer.

Physicians who are compensated on a salaried basis may, like any other employees, form a union for the purpose of dealing with their employers. Several examples may be cited of existing unions which represent physicians employed by hospitals or by such industries as the railroads. When this type of group negotiates for wages, it is called collective bargaining, is exempted from anti-trust action and is legal.

However, the great majority of practicing physicians are defined as "self-employed" under the law. Deriving their income on a fee-for-serv-

ice or capitation basis they are independent contractors and as such are subject to anti-trust laws. The Clayton Act, for example, grants statutory immunities to unions of employees but does not exempt non-employee organizations. If a non-employee organization negotiates as a group for payment, it is called price fixing and that is illegal.

Moreover, attorneys who have studied the question point out numerous legal decisions in which groups of essentially self-employed individuals were denied the immunities of union members. In one such case, in refusing to characterize the litigants as "employees," the U.S. Supreme Court pointed out that ". . . their desire is to continue to operate as independent businessmen, free from such controls as the employer might exercise."

The U.S. Supreme Court has made a similar observation regarding a physicians' organization —in this case the American Medical Association. The Court clearly distinguishes the physician members of AMA from "employees" and therefore rules them subject to Federal anti-trust laws:

"In truth, the petitioners represented physicians who desired that they and all others should practice independently on a fee-for-service basis where whatever arrangement for payment each had was a matter that lay between him and his patient in each individual case of service or treatment. The petitioners were not an association of employees in any proper sense of the term. They were an association of individual practitioners each exercising his calling as an independent unit."

The president of one "physicians' guild" is quoted by *Medical World News* as saying that because of the legal questions involved, his organization is not calling for the establishment of physicians' "unions" as such. "We are pushing for an organization capable of action in concert with and similar to the operation of unions," he said, adding that there is no reason why physicians cannot form associations that act like unions without calling themselves unions.

Here again, an important point might be raised: attorneys emphasize that the particular name chosen by such an organization makes no difference. It is the actions an organization takes that determines whether it is, in fact, a union.

The primary weapons in the arsenal of any trade union are activities which would quickly embroil any physicians' organization—whatever it chooses to call itself—in serious legal difficulties. Both criminal and civil prosecutions are possible under anti-trust laws. Criminal prosecutions can result in fines or imprisonment. Civil suits can lead to the award of damages—even treble damages—and highly restrictive injunctions. Furthermore, certain acts are held to be per se violations. Boycotting and pricefixing, essential tools for any trade union, are illegal if undertaken by anyone else. Trade union members, for example, can refuse to do business with those not meeting union terms. A concerted refusal to deal initiated by any other organization is a per se violation of anti-trust laws.

Other Questions Raised

Faced by encroaching and often unfair government controls, the prospect of collective bargaining—a successful tool for labor—naturally seems attractive to many physicians. However, today collective bargaining through any organized effort can only be effective if the bargainers are willing—and legally able—to utilize the weapons of strike or boycott, or both. Even disregarding legal considerations for a moment, several other important questions are raised regarding possible collective bargaining by physicians.

First, with whom would a physicians' union bargain? For any group of employees, the answer is simple: with the employer. But generally, physicians are not employees except to the extent that their patients might be seen as their "employers."

Would they bargain with government? While government certainly has become a major factor in medical care, the private sector has far from disappeared. Attempts at sweeping negotiations with government could easily act to encourage further government inroads into the medical care field. For physicians in private practice, there seems to be no counterpart to labor's "employer" with whom a physicians' union might bargain.

Next, against whom would a physicians' union strike (again ignoring legal considerations for a moment)? Against patients? Effective collective bargaining depends on muscle, and muscle would mean disregarding patient welfare to one degree or another. In this regard, even a strike against government, such as occurred in Quebec, essentially hurts the public rather than the politicians.

Obviously, the professional and ethical considerations of a strike by physicians are major considerations. The resort to striking—or withholding services or "collective non-practice" or any other euphemism for striking—is clearly in conflict with basic professional concepts. Certainly the majority of physicians recognize the public responsibilities of the profession and would find a strike unthinkable except in the most extreme desperation. In 1970, CMA's position on this subject was clearly stated by its House of Delegates: "that the physicians of California have one major responsibility and duty: the provision of medical care of the highest quality to all persons. That the California Medical Association believes that abandonment of patients through a concerted denial of service by physicians (strike) is an unacceptable method of solving problems or differences . . . The CMA urges that methods be sought by all members of the health team, including those administrative and political agencies which use the services of health workers, to achieve their desired objectives in an equitable, professional manner, protective of the health of all, without resorting to denial of service."

Another factor in unionization, "deprofessionalization," also is an important concern. CMA President Jean F. Crum puts it this way, "From my view, unionizing the medical profession would bring with it, in addition to a great many other disadvantages, the important deterrent that we would forever forfeit our professional status and jeopardize the dignity of our profession."

What effects could the existence of a powerful "union" of physicians produce with individual patients or the public generally? In a democracy, every effective organization must recognize that public understanding and support are essential if its objectives are to be achieved. Even discounting the possibility of strikes by doctors, there might well be difficulty in avoiding public opposition to physicians who band together for purely economic reasons. The importance of public opinion must not be ignored.

However distasteful it might be, the possibility of a strike can never be totally or realistically discounted for any organization negotiating for economic goals. What would be the financial effect for a physician and his family of a prolonged strike? Trade unions use the instrument of a "strike fund" to carry their members through the period of lost income. However, such a concept would be very difficult to apply for such professionals as physicians.

Another point is the effect that a physicians' union ultimately might have on the type of practice prevalent in this country. Certainly the very basis of the union concept—negotiation between employer and employee—would seem to favor modes of practice in which physicians are employees and to discourage individual private practice. The result could well be a radical shift in type of practice.

Legal and Professional Considerations in a Nutshell:

Unions are clearly defined under law and operate within a narrow framework. Employees (salary or wage earners) may unite to bargain collectively with their employers for improvement in the terms or conditions of their employment. In all cases, the relationship of employer-employee must be involved. It should also be noted that unions legally exercise considerable power over their memberships.

Any organization whose members are defined as self-employed does not fit the legal definition of a union. Therefore such an organization, whatever it calls itself, is not allowed the special statutory immunities granted trade unions and is not free to engage in collective bargaining. This is not to say that there is anything illegal in the formation of an organization for physicians in private practice which uses the name "union." However, attorneys point out that overwhelming legal problems will arise if the organizations acts —or even threatens to act—like a union. In addition, the matter of collective bargaining raises significant professional questions.

In short—because of the numerous legal and professional considerations—a physicians' union would be limited to the same activities presently being done by organized medicine. Furthermore, the danger exists that such a union would suffer from many of the disadvantages of the trade union, without the advantages. The primary responsibility of physicians remains to provide medical care of the highest quality to all persons.